No. 15,292

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NORTH AMERICAN AVIATION, INC., a corporation,

Appellant,

vs.

WANDA LEE HUGHES and RANDALL L. HUGHES, a Minor, by his Guardian *ad Litem,* HARRY SUTTON,

Appellees.

REPLY TO PETITION FOR REHEARING.

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TABLE OF AUTHORITIES CITED

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Introduction.

The petition for rehearing is based upon one theme which is that there is no evidence to support the verdict of the jury. This is a head in the sand position.

I.

Circumstantial Evidence Is Not Speculative.

There is substantial affirmative credible evidence to support the verdict and the opinion of this court. This evidence is not speculative or uncertain. Some of it is circumstantial, but circumstantial evidence is not necessarily speculative.

Supplied with the evidence which may be in part circumstantial, it is for the jury to determine the issues.

Undoubtedly the jury came to a conclusion as to what happened and why. Having no way to ascertain at this point just what the jury concluded, it is the accepted appellate rule in such cases that if the evidence is such as to support the verdict on any combination of facts, which is supported by the evidence, the verdict must be sustained. The opinion of the court properly applied the rule.[1]

II.

Appellant Was Careless in Manufacturing the Plane.

From the unexplained presence of an *electrical* fire in the fuselage of the plane in the course of manufacture[2] and the callous indifference of the manufacturer's inspector[3] and the fact of the accident itself,[4] the jury was warranted in concluding that appellant was careless in manufacturing the plane.

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[1]*Jaffke v. Dunham* (Jan. 14, 1957), 352 U. S. 285, 1 L. Ed. 2d 314.

[2]Appellant's witness, Mr. Clayton, testified: "The only reason there would be any foamite in there would be if we had an *electrical fire* in the assembly." [R. 810.] (Emphasis added.)

[3]Appellant's witness, Mr. Clayton, read the inspector's notation on the squawk sheet relative to the *electrical fire* in the fuselage as follows: "Due to use of foamite cleaner, it looks like, or due to use of foamite, clean all relay boxes and terminal connectors, such as reverse current relay, field current relay, armament relay, and so on." [R. 810.] It is within the province of the jury to infer that the inspector's attitude was to brush off the foamite so that the fact there had been an electrical fire wouldn't be noticed.

[4]*Sullivan v. Shell Oil Company* (C. A. 9th, 1956), 234 F. 2d 733.

Paxton v. County of Alameda (1953), 119 Cal. App. 2d 393, 408, 259 P. 2d 934.

III.

The Pilot Did Not Contribute to the Accident.

The pilot is dead and concededly the presumption of due care applies to preclude any speculation that he was contributorily negligent.[5] There is affirmative evidence that there was a flame-out[6] followed by an explosion in the air[7] and that the plane was afire in the air.[8] This is most certainly ample evidence of mechanical failure.

Appellant's briefs urged that there was a possibility that the pilot contributed to the happening of the accident in a non-negligent way. The authority which appellant relied upon was distinguished in appellees' brief,

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[5]Appellant's Opening Brief, pages 35-37.

[6]The incident report which was admitted without objection reads:

"Subsequent reports from the City Operations personnel, from North American Aviation supervisors and from the City Fire Department personnel indicate the aircraft, a jet, had an apparent flame-out at approximately 100 feet altitude. . . ."

Test Pilot Frank C. Smith testified:

". . . I lost sight of it in the fog, and we were turning back into the lounge area, and we heard the engine stop with an explosion immediately, and we looked out to the area and saw the black smoke coming up through the fog." [R. 524.]

[7]Patrick H. Rogers testified:

"It was air-borne at the time I seen it, it was air-borne about 25 to 40 feet, and just—well, it hadn't even got to the end of the runway when there was a loud explosion and a big burst of flame, 25 to 40 feet off the runway." [R. 180.]

[8]Patrick H. Rogers testified:

"The Court: When you first saw this airplane, you saw a flash?

The Witness: Just a great big ball of fire.

The Court: It was in the fog then, was it?

The Witness: It was air-borne in the fog." [R. 181.]

Robert E. Callagy testified that when he first saw the plane it was air-borne and on fire. [R. 186-187.]

page 42, and shown to be inapplicable. Non-negligent pilot error is pure speculation without suggestion from the evidence. But the true color of the argument finally appears in the conclusion of the petition for rehearing, page 20, where appellant argues:

> ". . . the evidence is in such a state that it is just *as* probable that the crash was caused by negligence on the part of General Electric or negligence on the part of the deceased pilot as it was due to any negligent act or omission on the part of North American."

This argument is precluded by the conceded presumption that the pilot acted with due care.

IV.

The Possibility of Negligence of General Electric as a Contributing Factor Is Precluded.

The supposed possibility of negligence of General Electric is a classical straw man. General Electric manufactured the motor and delivered it to appellant. It was not a sealed unit which could not be disassembled for inspection without destroying it.[9] It could have been taken apart. Even if the engine was defective, the jury was warranted in concluding that appellant had not adequately inspected it. On the other hand, appellant put on experts to testify with convincing certainty that there was nothing wrong with the engine and this was uncontradicted.

Experts established that flame-outs are the result of fuel starvation, a condition which results from parts

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[9]Hence it does not come within the rule established in *O'Rourke v. Day and Night Water Heater Co.* (1939), 31 Cal. App. 2d 364.

outside of the engine. In other words, flame-out results from parts manufactured and installed by appellant. Appellant's experts also testified that this doesn't happen on take-off except for mechanical failure.

Appellant has carefully avoided any recognition of those parts of the record quoted in the footnotes and in fact simply disregards everything that is unfavorable to appellant's interests. It bases its petition upon its own assertions, the record notwithstanding. This affords no common ground for argument of questions of law which it asserts are reason for rehearing and by the same token affords no ground for conflict between this court's opinion and the opinions of other courts.

V.

The Court's Decision in No Way Conflicts With Decisions of Any Jurisdiction on Cases Involving Manufacturer's Liability.

The argument on manufacturer's liability as stated in Appellant's Opening Brief, pages 26-28, in its Reply Brief, pages 16-22, and in the Petition for Rehearing, pages 6-11, is pretty well confused with other arguments of all sorts. It hardly seemed necessary to comment upon such cases as *McPhersen v. Buick Motor Company* (1916), 217 N. Y. 382, 111 N. E. 1050, 65 C. J. S. 629, and other cases cited as following this doctrine.

The argument was fallaciously made originally and still is in the Petition for Rehearing. The principle is that if a manufactured article is the kind of article which will cause more than trivial harm if carelessly manufac-

tured, the manufacturer must use reasonable care in manufacturing it. The Supreme Court said that there must be knowledge of a danger not merely possible but probable.

This means that there must be knowledge that the article is the kind of thing which will be harmful if not carefully manufactured. Everybody knows that an airplane of any kind is such an article. Even appellant knows this.

Applying the law to this case, the question is whether appellant did exercise reasonable care in manufacturing the aircraft in question. This is a question of fact which the jury resolved against the appellant upon the evidence already noted.

This doctrine doesn't involve any question as to whether appellant knew or didn't know that there was anything wrong with the ill-fated aircraft. Appellees have heretofore avoided noticing this argument to save appellant the embarrassment of its mistake. It must by now have been knowingly made again and it should be sufficient to point out that it is a specious argument at best.

The court's reference to the evidence of fire is unquestionably correct. The testimony already quoted in footnote (2) above is hardly susceptible of any inference except that there was an *electrical fire* in the airplane before manufacture was complete. That nothing was done about it except to put out the fire and clean off the foamite leaving the defect is a fair inference.

Credit should be given for imagination in suggesting that this *"electrical fire"* was in reality a little fire of paper on the floor of the airplane and for salesmanship to conclude that this was the most probable explanation of the phenomena described by appellant's witness as an *"electrical fire* in the assembly." All of the honors for unrestrained speculation and conjecture should go to appellant. But to return to the reality of the record, the fire was an *"electrical fire in the assembly."*

VI.

It Was Not Necessary for the Court to Mention the Doctrine of Res Ipsa Loquitur.

As pointed out in the brief of appellees, this case could rest upon the simple principles of circumstantial evidence or upon the doctrine of *res ipsa loquitur*. In view of the fact that the verdict can rest upon either principle, the appellate process is complete if the opinion sustains the case on one of them. Discussion of the other is unnecessary and not required.

There is no reason for the supposition that the court has applied the doctrine of *res ipsa loquitur* except that appellant refuses to consider the case from any other view point except the one which it mistakenly considers the most vulnerable. The fact that both parties discussed the doctrine in former briefs is of no consequence to the court in making its decision.

VII.

The Court in Its Opinion and Appellees in Their Brief Did Not Speculate on the Evidence.

The limitations of appellees' tendered explanation of the tragedy are clearly stated by appellees in their brief, pages 19-21. It is there pointed out that this explanation is supported by the evidence and the reasonable inferences to be drawn therefrom. The only element of speculation involved is whether the jury reconstructed the event in the same way or came to some other equally tenable conclusion from the evidence. The court in its opinion clearly enough adopted the same approach.

It is well to bear in mind that the evidence on some important issues of fact was substantially conflicting. In such circumstances the Supreme Court has said:

> "It is no answer to say that the jury's verdict involved speculation and conjecture." (that accident was impossible and must have been murder). "Whenever facts are in dispute or the evidence is such that fairminded men may draw different inferences, *a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inferences.* Only when there is a complete absence of probative fact to support the conclusion reached does a reviewable error appear. But when, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard as disbelief whatever facts are inconsistent with its conclusion, and the appellate court's function is exhausted when that evidentiary basis becomes appar-

ent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." (Emphasis added.)

Lavender v. Kurn (1945), 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916, 923.

Conclusion.

From the evidence of "electrical fire in the assembly" of the plane, of the flame-out, the explosion in the air, the outbreak of fire in the air and the undeniably close connection between all of these, the jury was well within its established prerogative to find actionable negligence on the part of North American Aviation, Inc.

"The inference of negligence is not required to be an exclusive or compelling one. It is enough that the court cannot say that reasonable men could not draw it."

Bauer v. Otis (1955), 133 Cal. App. 2d 439, 443, 284 P. 2d 133.

The petition for rehearing should be denied.

Respectfully submitted,

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